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No.

In the

Supreme Court of the United States

KATHY W. FENTROY,

Petitioner,

v.

DILLARDS TEXAS OPERATING LIMITED PARTNERSHIP,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are racial comments directed towards a plaintiff required under Title VII to establish a claim of hostile work environment when there is sufficient evidence of racially disparate treatment in terms and conditions of employment, such as promotion, compensation, demotion and other general racial differences in treatment in the workplace?

2. Can sufficient evidence of racially disparate treatment in terms and conditions of employment, such as promotion, compensation, demotion, and general racial difference in treatment in the workplace, be used to support a claim of hostile or abusive work environment racial harassment?

3. Has the plaintiff established a claim of a racially hostile and discriminatory work environment when she presents sufficient evidence that she was persistently subjected to a work environment, in which she was harassed and discriminated against because of her race, in that less qualified white employees were given promotions, larger raises, more desirable work assignments, similarly situated white employees were returned to their regular positions after their leave of absence terminated, while plaintiff was assigned to an inferior position and that she was criticized more harshly than similarly situated white employees?

4. When the Circuit Court reversed the trial judge's order denying the employer's motion for judgment as a matter of law and amended judgment, awarding compensatory damages and rendered judgment as a matter of law for the employer, did the Circuit Court commit reversible error?

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IN THE

SUPREME COURT OF THE
UNITED STATES

KATHY FENTROY, Petitioner

Versus

DILLARD TEXAS OPERATING LIMITED PARTNERSHIP,
Respondent

PETITION FOR WRIT OF
CERTIORARI

Petitioner Kathy W. Fentroy ("Fentroy") respectfully requests that a writ of certiorari be issued in this case to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is found in Appendix A. The unpublished opinion and the amended judgment of the District Court of the Southern District of Texas, Houston Division is found in Appendix C. The memorandum and opinion granting in part and denying in part, summary judgment is in Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was entered on November 9, 2001. The Court of Appeals denied Fentroy's petition for rehearing on December 6, 2001 ,(Appendix B).

Subject matter jurisdiction for the United States District Court for the Southern District of Texas is invoked under 28 U.S.C. ss 1331 and ss 1343 (a) (4).

Jurisdiction of the Court of Appeals for the Fifth Circuit is pursuant to 28 U.S.C. ss 1291.

Jurisdiction of this Court is invoked under 28 U.S.C. ss 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, amended, recites in relevant part:

It shall be unlawful employment practice for an employer:

> to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual ....race.

Rule 50 of Title 28 provides in relevant part:

> (a) Judgment as a Matter of Law.
>
> (1) If during the trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

If for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling a renewed motion, the court may:

(1) if a verdict returned:
(A) allow the judgment to stand,
(B) order a new trial, or
(C) direct entry of judgment as a matter of law; or

STATEMENT OF THE CASE

Kathy W. Fentroy began a career in retail as a part-time sales associate at Joske's in 1980 while attending the University of Houston. After graduation, she worked full-time in the Gulfgate store women's department. She was selected for Joske's executive training program to prepare her to advance to area sales manager (ASM), operations manager, merchandise manager, assistant buyer, buyer and store manager positions. [Tr. 1-101:5-103:8]. She was promoted to ASM and worked in various departments, including, petite's, dresses, linens, gifts, lamps, children's, men's, and cosmetics, where she performed inventories, supervised sales associates, met with the store manager on

merchandise and department needs and various other duties. [Tr. 1-103:16-120:20].

Dillard's acquired Joske's in 1987. Fentroy, the only black ASM, worked in the men's department at the Gulfgate store and was involved with the transition. Subsequently, she was rated as very good and satisfactory with outstanding accomplishments.

In 1991, Fentroy questioned a $500.00 raise and her supervisor obtained more money for her. [Tr. 1-127:19-130]. She was rated promotable. [Tr. 1-120:3-127:14].

Dillard's opened the Texas City store and Fentroy gained valuable experience in assisting with the opening. She had already been involved in two renovations. [Tr. 1-129:15-1-132]. Fentroy was not satisfied with her relocation raise because she suspected that some white ASM's received more money.[1]

Fentroy informed Dillard's of her interest in a promotion. [Tr. 1-139:15-140]. She was concerned because promotions generally came from larger volume areas, but she was given less prestigious areas. Fentroy wrote to Gat Lemoine, director of stores, on August 11, 1994 of her aspirations of advancement with the company. [Tr. 1-139:22-1-141 (P.Ex. 11)].

In September 1994, Fentroy was transferred to the Woodlands store where she was the only black ASM. Fentroy was assigned to the highly visible prestigious men's department, an extremely high volume area. [Tr. 1-148: 7-9]. Harry Williams, a store manager, was Fentroy's supervisor. She worked almost single-handedly to prepare the department for the store opening and it was a success.[2] [Tr. 1-147: 3-11;]. Fentroy was assigned an assistant who was later taken away for use in another area, which resulted in trouble spots in Fentroy's department. [Tr. 1-147: 19-25, - 148: 1-12; Tr. 3-57: 19-25, 3-58: 1-8]. The assistant was given to a white ASM. [Tr. 1-145: 14-25, 1-146: 1-10].

After the busy Christmas selling season, Lemoine told Fentroy that Mr. Dillard was impressed with the men's area

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[1] She learned in discovery that she had received less. [Tr. 1-134:2-136:2].

[2] Sharron Green, a sales associate, testified that construction workers were seen taking items from the store.

during his holiday visit. [Tr. 1-140: 5-10]. However, the inventory was then taken and there was a severe shortage in the men's department, [Tr. 1-152: 22-25], as well as in other departments. [Tr. 1-152: 13-16]. Fentroy was called behind closed doors with Williams and Lemoine and harshly criticized and in so many words accused of theft. [Tr. 150: 13-25-1-154: 1-19]. Fentroy was given an ultimatum. To stay in her ASM position, she had to turn the inventory around or she would be terminated, or she could take a lesser volume area in another store. [Tr. 1-153: 1-14]. Although other ASM's had inventory shortages, they were not treated in the same manner. All ASM's were given written counseling. [Tr. 1-153: 15-24; 1-154: 11-25-1-155: 1-17; (P. Exs. 14, 53, 60, 68, 70, 71). Usually, the ASM's were given an opportunity to improve before they were faced with termination. [Tr. 4-67:3-7].

After the January inventory, Williams spoke to Fentroy in a harsh, insulting and demeaning manner. [Tr. 1-157: 24-25, 1-158: 1-25, 1-159: 1-11]. He told her it would be hard to do the turnaround, but that she had to do it. He pressured her once or twice a week commenting that, "These results have to be good. This had to be done. You have to be on track." White ASM's with inventory shortages were not treated in the same manner. [Tr. 1-159: 12-25, 1-160: 1-12]. Still, Fentroy was working without an assistant, but she believes that Felicia Tillery, a non-black ASM, had an assistant. [Tr. 1-160: 16-25, 1-161:1].

When the June 1995 inventory was completed, Fentroy had a very good inventory, but she received even harsher criticisms from Williams, Lemoine and Olejniczak, operations manager. [Tr. 1-161: 1-25, 1-162: 1-25, 1-163: 1-24].[3]

Fentroy became ill and had to seek medical attention. She missed time from work because of panic attacks and acute depression. [Tr. 1-172: 4-13]. She could not sleep at night because she knew that when she awakened, she would have to go to work and go through the same harassment

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[3]Williams belittled her after a highly successful Sunday sale. Lemoine commented that the very good inventory could be better. Fentroy had the best schedules according to Olejniczak but they could be better. [Tr. 4-34:4-120].

again, so she would sit up all night. It got to the point that she could not even leave the house. [Tr. 1-172: 16-25].

Temple[4] testified that she observed interaction between Williams and Fentroy. Temple testified that Fentroy "would get an awful lot of pages to the office or just to her department". At ASM meetings, Temple could tell that Fentroy was under enormous pressure to get a lot of things done because she had no assistant, although she had the second largest volume department. According to Temple, other ASM's were not treated in the same manner. [Tr. 2-167: 3-25, 2-168: 1-25, 2-169: 1-6].

Temple testified that Williams divided the damage dollars and white ASM's received a lot more damage dollars than black ASM's. [Tr. 2-169: 7-25]. She further explained that if you did not receive damage dollars you could not pass your inventory. [Tr. 2-170: 3-8].

Further, Temple testified that Olejniczak told her that she could not hire a black applicant who Temple believed was "super qualified" for a sales position. Olejniczak informed Temple that she was to hire to reflect the community of the Woodlands store and that they were not to make their customers uncomfortable. The Woodlands is a mostly Caucasian community. [Tr. 2-157: 13-25, 2-158: 1-22].

Tillery testified that Williams told her that blacks make the store look "dingy" during a discussion about his reason for not hiring a black applicant, as he did not wish to have more black employees. She was told to place the applications of black applicants to the side. Tillery testified that very few black applicants were hired as compared to whites and Hispanics. Olejniczak told Tillery, "Well, this is a classy community and they are basically white so we have to hire associates that would fit within the store and the community." Black applicants, with very few exceptions, did not make it to the third interview, even though some had such qualifications described as vibrant, imaginative, fast, easy to get along with, knowledgeable, potential to move up within the company.

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[4]Denine Temple, an African-American, was hired April 8, 1995 as a sales associate and promoted to ASM within the very short span of three (3) months.

In 1995 Fentroy received a $500.00 raise and her white counterparts received approximately $2,000.00. [Tr. 3-44:13-18 (ROA 680 –684)].

Evidence was presented to the jury that Tillery observed the intimidation, ridicule and insults suffered by Fentroy. In meetings, Williams was more expressive, waved his hands and spoke to Fentroy in a manner unlike he spoke to everyone else. [Tr. 2-212: 7-16]. Tillery testified that Fentroy was scrutinized more than other ASM's at the meetings.[Tr. 2-212: 17-22] and that he just "rode" on her.[Tr. 2: 212: 23-25]. Williams told Tillery, concerning Fentroy, "she had to be gone." [Tr. 2-213: 4].

Tillery and other ASM's tried to assist Fentroy by entering markdowns and schedules for her, especially while she was on leave of absence. But, often, the markdowns were not approved, schedules were changed which left Fentroy's floor unmanned. Hours were taken away from her, even while she was there and given to the cosmetics ASM, who is white. [Tr.2-212:11-25]. There were days when the men's department had only four people working and it was "absolutely" horrendous because people were walking everywhere."[Tr. 2-214; 1-19]. Tillery was then told that she was not to assist Fentroy. [Tr. 2-214: 20-24], and that Fentroy was unfit to be an ASM. [Tr. 2-215: 4-7]. Olejniczak and Williams asked Tillery to watch Fentroy and Olejniczak said that Fentroy was not going to pass the inventory. [Tr. 2:215: 8-25, 2:216: 1-25].

Fentroy was not functioning. She lost all of her hair. She wasn't associating with people. She missed work. [Tr.1-173: 1-11; P. Ex. 16]. During an absence from August 22, 1995 to August 29, 1995, Fentroy called in and Williams told her that she needed to come to work or they would find someone else to do her job. [Tr. 1-173: 4-25]. When she returned to work she had a panic attack and was out again. [Tr. 1-174: 1-25, 1-175: 1-5]. Again, Williams threatened to terminate Fentroy. [Tr. 1-175: 15-25]. When Fentroy returned to work on September 18, 1995, she started shaking uncontrollably, crying and "just having a breakdown." [Tr. 1-176: 1-15]. During this episode, Fentroy met with Williams and Olejniczak who suggested that she request a fax from her

doctor to be assigned to a lower volume area, which she rejected, and to sign the leave of absence form. She signed the form and was driven to her home by a coworker. [Tr. 1-176: 16-25) 1-177: 1-7 (P.Ex. 20)].

On December 8, 1995, Fentroy was released to return to work without need for reasonable accommodations. She returned to work on December 11, 1995. [Tr. 1-182: 7-25 (P.Ex. 22)]. Upon return, Fentroy was informed by Williams that there were no management positions available and she was assigned to the women's department, dresses area, as a sales associate at $9.70 per hour, a cut in pay of approximately $1,400.00 per month. Her supervisor was Tillery who testified Williams knew that there was indeed a management position available in the women's department for an assistant ASM. [5] [Tr. 1-183: 1-25, 1-184: 1-14, 2-218: 1-23]. Mark Castro, a non-black ASM, replaced Fentroy in the men's department.

Fentroy was taken aback by the demotion and cut in pay. She called to report this directly to Alex Dillard on December 13th and spoke with his secretary. Lemoine called and yelled at Fentroy that she should not have called Dillard and that she should have called him for an explanation.[Tr. 1-184: 17-25, (P.Ex. 26)]. He told her that she had requested the demotion and that she had been out ill a long time. Fentroy did not request a demotion.

Candis Gatewood, a white ASM, who worked with Fentroy in the Texas City store, was returned to her ASM position after a leave of absence which exceeded twelve (12) weeks. [Tr. 1-185: 1-22 (P.Ex. 84)]. Lemoine's territory included the Texas City store. Williams testified that the corporate policy regarding leave of absence was very rigid. He also consulted with Lemoine regarding availability of management positions and the demotion. [Tr. 3-185:2-7, 4-75:2-23].

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[5]Summary judgment evidence indicates that sixteen positions became available for operations manager and merchandise manager in stores supervised by Lemoine between 1994 and February 9, 1996. More than 200 positions above the level of ASM were filled in the Texas area from 1991 to 1996. The jury did not receive most of this evidence.

For almost two months after she returned to work, Fentroy continued to be subjected to insult, ridicule and intimidation. She was ignored by upper management, questioned and discredited by peers. She was watched and given less than forty hours a week. Williams chose a new hire, standing right next to Fentroy, as the store auditor during inventory, even though Fentroy had taken over 30 inventories and managed over 100 people. She observed that white ASM's fresh out of college were in positions that she had been told should be considered a promotion for her after many years of working to get to that point. [Tr. 1-188: 1-25, 1-188: 1-25, 1-189: 1-3]. After sixteen years, in retail with Joske's, then Dillard's, over twelve of those years as an ASM, Fentroy was demoted to the entry-level position she had held as a college student.

Fentroy submitted a letter of resignation effective February 9, 1996, to management. She notified Mr. Dillard by letter, but she received no response.

PROCEEDINGS BELOW

The jury was instructed, by the trial judge based upon the instructions submitted by the parties, without objection, on the elements under Title VII for finding discriminatory failure to promote, discriminatory compensation and demotion and on the elements of a hostile work environment-racial harassment claim. [6] The jury was asked if Dillard's subjected Fentroy to a hostile and abusive work environment on account of her race, and they answered yes. Additionally, the jury was instructed on compensatory and punitive damages and awarded $24,000.00 in compensatory damages and $72,000.00 in punitive damages. Dillard's filed a motion for judgment as a matter of law on five grounds as follows:

1. that some of the acts upon which Fentroy bases her claim

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[6] Although Dillard's instruction number 11 contained qualifying language, and objection was not addressed to the trial judge at the charge conference. The parties consented to the questions to the jury regarding the work environment (Appellant's Record Excerpts 9).

are barred by the statute of limitations;

2. that there is insufficient evidence of discrimination to support the verdict;

3. that certain evidence was improperly admitted at trial;

4. that there is insufficient evidence of causation to support the verdict; and

5. that there is insufficient evidence to support an award of punitive damages.

The trial judge found that Dillard's was not entitled to relief based on the first four grounds, but that judgment was a matter of law in Dillard's favor was appropriate regarding the punitive damages award. Dillard's filed an appeal to the Fifth Circuit Court of Appeals. Subsequently, Fentroy filed a cross appeal on the punitive damages issue.

The Court of Appeals reversed, finding that Fentroy may have presented sufficient evidence of disparate treatment in promotion, compensation and demotion, but that the jury was not asked whether Fentroy was subjected to disparate treatment on account of her race. The jury was asked whether Fentroy was subjected to a hostile and abusive work environment on account of her race and the Court of Appeals recited that the disparate treatment evidence did not support that question. The Court of Appeals maintained that there was no evidence of racially discriminatory, intimidation, ridicule or insult and that no evidence indicated that Fentroy was the subject of racial harassment. The Court of Appeals reasoned that Tillery's testimony did not indicate that anyone made remarks about Fentroy's race or that she knew any facts to suggest that Williams wanted Fentroy gone because she was African

American. The Court of Appeals held that the trial judge erred in denying Dillard's motion for judgment as a matter of law and the amended judgment was reversed. The court noted that arguably, Fentroy might have been entitled to remand of her disparate treatment claim, but that she had waived remand by not challenging the trial judge's summary judgment order. (Appendix D). Fentroy filed a petition for rehearing, which was denied on December 6, 2001. Therefore, Fentroy filed timely this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE INTENT OF CONGRESS ON AN IMPORTANT FEDERAL QUESTION THAT WAS DECIDED BY THE COURT OF APPEALS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

This case presents the question of whether racial comments must be directed towards a plaintiff to establish hostile work environment racial harassment or whether evidence of persistent and pervasive discriminatory conduct, which destroys equal opportunity in the workplace, can be used to support this claim.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399,91 L. Ed.2d 49 (1986), this Court explained that a violation of Title VII might be established by proving that discrimination based on sex has created a hostile work environment. Fentroy presented sufficient evidence that she was persistently subjected to a work environment in which she was harassed and discriminated against because of her race in that less- qualified white employees were given promotions, larger raises and more desirable work assignments. Further, she presented sufficient evidence that white employees who were on leave were returned to their regular ASM positions after their leave terminated, whereas Fentroy was assigned an inferior position, and that she was criticized more harshly. Although the Court of Appeals found sufficient evidence of disparate treatment in terms and conditions of employment, such as promotions, raises, demotion upon return from leave of absence, harsher discipline, and other acts showing a difference in treatment, the court explained that this evidence cannot support a hostile work environment claim.

This is not the typical hostile work environment racial harassment case where racial slurs permeate the workplace. This is a hostile work environment racial harassment case

where persistent and pervasive discrimination based on race permeates the workplace, with such frequency and severity as to destroy equal opportunity in the workplace. The critical issue, under Title VII, is whether members of one race are exposed to disadvantages terms and conditions of employment to which members of the other race are not exposed. See *Harris* 510 U.S. 25 (Ginsburg concurring).

To establish an actionable claim of hostile work environment racial harassment under Title VII, plaintiff had to demonstrate the following five elements: (1) she belongs to a protected class; (2) she was subjected to unwelcome racial harassment; (3) the harassment complained of was based on her race; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer is liable for the harasser's conduct and knew or should have known of he harassment and failed to take prompt, effective, remedial action. *Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 at 2402-07, 91 L.Ed.2d 49 (1986); *Cortes v. Maxus Exploration Company*, 977 F.2d 195, 198-9 (5th Cir. 1992).

The Court of Appeals agreed that Fentroy was subjected to disparate treatment because of her race. The court must view the facts, circumstances and the entirety of the trial record in the light most favorable to the non-movant, drawing all factual inferences in favor of the non-moving party, and leaving credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts to the jury that voted unanimously in Fentroy's favor, which found that Fentroy was subjected to a racially hostile or abusive work environment on account of her race. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S., 120, 133 S. Ct. 2097, 147 L.Ed 105 (2000).

This court decided that

> Although this evidence may support a jury verdict for a disparate treatment claim, the jury was not asked whether Fentroy was subjected to disparate treatment because of her race. Instead, the jury was

> asked whether Dillard's "subjected Ms. Fentroy to a hostile or abusive work environment on account of her race?" The evidence discussed above does not support this question.

The court of appeals erred in its decision.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e – 2(a)(1). *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

This Court has repeatedly held that the question of whether a work environment is "hostile" or "abusive" in violation of Title VII can only be determined by looking at ***all circumstances*** which may include frequency of discriminatory *conduct*, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with employees work performance. *Harris*, 510 U.S. at 23 .

It was the persistence of the treatment Fentroy received in every aspect of the employment relationship that made the environment racially hostile and abusive. Taken as a whole, the circumstances, evidence and testimony in *Fentroy v. Dillard Texas Operating Limited Partnership* unequivocally support, among other incidents, that Fentroy was *persistently* passed over for promotions that were granted to lesser qualified white employees, that Fentroy received smaller pay raises than her white counterparts, that Fentroy was disciplined more harshly than white ASMs, that Fentroy was demoted upon return from medical leave, unlike white employees, and that the store's manager and operations manager had a discriminatory attitude against certain potential employees, because they did not "reflect the store's community", they "made the store look dingy" and ultimately, because they were black.

Having one's career advancement and job security threatened because of her race is pervasively insulting and intimidating. As the evidence and testimony indicate, Mr. Williams' discriminatory attitude toward Ms. Fentroy did not change even as she made great strides to meet the inventory and performance expectations. It did not matter how well she performed on the job, because the fact that she was black did not change.

In *Harris*, this *Court* considered the definition of a discriminatorily abusive work environment and explained that a hostile or abusive working environment can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. *Harris v. Forklift*, 510 U.S. at 20.

Denying raises and promotional opportunities to an employee after more that a dozen years of service simply because she is black is humiliating and serves well to discourage an employee from remaining on the job. Overall, making an employee the subject of harsher criticism, greater scrutiny and racially disparate treatment in the terms, conditions or privileges of employment is both intimidating and humiliating.

Ms. Fentroy has shown through evidence and testimony in the record that she was the subject of insult, intimidation, humiliation and disparate treatment in the workplace because of her race. The court, however, concluded that:

> No evidence indicates that Fentroy was the subject of racial harassment.
>
> Even Tillery, who was arguably the most damaging witness for Fentroy, testified that she was not aware of anyone making any remarks about Fentroy's race, and that she did not know of any facts that suggested that Williams wanted Fentroy gone because she was African American.

> Without evidence of racial harassment, there is not evidence to support the jury's verdict.

The phrase terms, conditions, or privileges of employment evinces a congressional intent 'to strike at the ***entire spectrum of disparate treatment*** of [whites] and [blacks] in employment,' ***which includes requiring people to work in a discriminatorily hostile or abusive environment***. *Meritor*, 477 U.S. at 65; *Harris*, *510* at 20.

The court of appeals is establishing that if an employer falls short of making open or direct racially offensive remarks or comments about an employee's race, that there can be no success on a racial harassment or racially hostile or abusive work environment claim. The court of appeals has erred by failing to consider the distinct possibility that an employer's discrimination "may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees." *Rogers v. EEOC*, 454 F. 2d 234 (5th Cir. 1972).

Did Congress intend that racial slurs be necessary to prove discriminatory terms and conditions of employment under Title VII? In *Rogers*, the court does not indicate that racial slurs or comments were directed towards the plaintiff. The Fifth Circuit recited that mere utterance of racial epithets was not sufficient to establish a hostile work environment. Fentroy asks this court to recognize that "as patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate would undoubtedly devise more sophisticated methods to perpetuate discrimination among employees." *Id.*

The language of Title VII evinces a Congressional intention to define discrimination in the broadest possible terms. *Rogers v. EEOC, 454 F. 2d at 237.* "Employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and

butter issues." *Id.* As a judicial body, the court "must be acutely conscious of the fact that Title VII should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination." *Id.*

OTHER CIRCUIT COURTS

The Court of Appeals has taken an extremely narrow view that there was no evidence which indicated that Fentroy was subject of racial harassment by limiting its review of the evidence to the Tillery's testimony that she was not aware of remarks about Fentroy's race or that Williams wanted Fentroy gone because she was African American. Under this definition of workplace harassment, the employer's discrimination against other African Americans would be irrelevant to whether Fentroy suffered racial harassment. Such a myopic view of harassment is not in keeping with the directives of *Harris v. Forklift Sys.*, 510 U.S.17 (1993), that courts are to consider the "all of the circumstances" in determining whether a hostile work environment exists. See e.g. *Jackson v. Quanex Corporation*, 191 F.3d 647 (6th Cir. 1999), (citing *Burns_v. McGregor Elec. Indus., Inc*, 955 F. 2d 559 (8th Cir. 1992) abrogated on other grounds by *Miller Woodharbor Molding & Millwork., Inc.* 174 F. 3d 948, 949 (8th Cir. 1999). (Under the totality of the circumstances approach, a district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode); *Andrews v. City of Philadelphia.*, 895 F 2d 1469,1484 (3rd Cir.1990) ("[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.") As the *Quanex* court further explained the entire purpose of a hostile work environment claim is defeated if each offensive event is considered in isolation as the very meaning of "environment" is [t]he surrounding conditions, influences or forces which influence or modify. Blacks Law

Dictionary 534 (6th ed, 1990). Conduct need not be directed at the plaintiff in order to constitute conduct violating Title VII. *Id.*

Title VII prohibits" working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of the minority groups workers" *Meritor Savings Bank v. Vinson*, 477 U.S. 57,66 (quoting *Rogers v EEOC*, 454 F 2d 234,238 (5th Cir. 1971). In *Rogers*, the court approved a Title VII harassment claim brought by a Hispanic employee who contended that her employer created a hostile work environment for employees by discriminating against the Hispanic clientele. The *Rogers* opinion did not indicate that racial slurs were directed towards the plaintiff. *Meritor* dictates that an employee may create hostile work environment even when it directs its discriminatory acts or practices at the protected group of which the plaintiff is a member and not just the plaintiff herself.

In the instant case, Fentroy presented sufficient evidence that Dillard maintained discriminatory hiring practices, as blacks made that store look "dingy".

In the "totality of the circumstances" approach, the court must look at the evidence of racial harassment, such as Fentroy's testimony that she was the only African American ASM at the Woodlands store until Denise Ingram was hired and quickly promoted. Tillery's testimony that Fentroy (1) was singled out and that Williams just "rode on her ", (2) Fentroy didn't have proper staffing in her area, (3) was treated differently than white ASM's in the way in which Williams talked to her ASM meetings, more scrutiny on her (4) hours taken away from her and given to Julie Allen, a white ASM, (5) Tillery was told not to help Fentroy who had the highest second highest volume area in the store (6) has no management help as her assistant was taken away to help non black ASM's (7) markdowns entered for her by telling were not approved by Williams which affects inventory. Fentroy testified that she was treated differently than white ASM'S. A hostile work environment claim must set forth evidence of discrimination based on race. *Oncale v. Sundowners 523* U.S. 75 (1998) . Discrimination based on

race simply means a difference in treatment of similarly situated employees on account of race Fentroy set forth sufficient evidence of that discrimination based on race created a hostile work environment, especially at the Woodlands store; and the disparate treatment provided further evidence of racial motivation. In *Huckabay v. Moore*, even though there was language by coworkers indicating race animus, this reverse case indicates that difference in treatment of similarly situated employees is used in determining whether a work environment is hostile on account of race 142 F.3d 233 C 5th Cir 1998).

As set forth above, other courts of appeal have taken a different view concerning the importance of racial, sexual, and age-based comments and conduct that are not directed towards a plaintiff, but are directed towards the plaintiff's protected class. Although the racial harassment cases reviewed contained racial slurs which are not present in the case at bar, other courts of appeal have explained that it is important to consider comments or conduct that are not directed towards the plaintiff as evidence that the work environment is objectively hostile towards a plaintiff's protected class. *Jackson v. Quanex*, 191 F.3d 647. Further, the court determined that racial slurs need not be hurled at a plaintiff in order to contribute to a work environment hostile towards the plaintiff. *Id.* (citing *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 673-75 (7th Cir. 1993).

The comments made by Dillard's management evidence an objectively hostile work environment. Managerial policy, when coupled with numerous discriminatory comments by individuals in high positions in a company, could indicate a cumulative managerial attitude that influences decision making for a considerable time, creating a corporate mindset or discriminatory atmosphere. *Ercregvich v Goodyear Tire and Rubber Co.*, 154 F.3d 356 (6th Cir. 1998) (an age case). Evidence of a sexual work atmosphere along with evidence of a specific hostility directed towards an employee is an important factor in assessing a claim of hostile work environment. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987). In determining whether a plaintiff has established hostile work

environment sexual harassment, the trial court should consider any harassment or unequal treatment based on sex, even if those acts are not sexual in nature. Since a critical issue is the environment, "incidents of sexual harassment directed at employees other than the plaintiff can be used as proof of the plaintiff's claim of a hostile work environment. *Stahl v. Sun Microsystems*, 19 F.3d 533 (10th Cir. 1994) (citing *Hicks v. Gates Rubber Co.)*. The same should apply to environmental racial harassment.

CONCLUSION

Fentroy respectfully requests that this Court grant her writ of certiorari to clarify the intent of Congress on this very important federal question. Congress intended that Title VII would result in the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 158 (1971).

When the purposes of Title VII are truly achieved, Kathy W. Fentroy and others in her position will have no need to seek redress through the court process. Employers such as Dillard's will be greatly enriched with a loyal and dedicated workforce. In sum, our country will be greatly served in upholding the laws for all by requiring equal opportunity in the workplace.

Dated: March 6, 2002

Respectfully submitted,

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No. 00-20552

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KATHY W. FENTROY,
Plaintiff-Appellee – Cross-Appellant,

versus

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP, ET AL
Defendants.

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP
Defendant-Appellant – Cross-Appellee.

No. 00-20990

KATHY W. FENTROY,
Plaintiff-Appellee,

versus

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP, ET AL
Defendants,

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP
Defendant-Appellant.

Appeals from the United States District Court for the
Southern District of Texas, Houston

Before DAVIS and JONES, Circuit Judges,
and PRADO,[1] District Judge.

Filed November 9, 2001

PER CURIAM:[2]

This appeal arises from Kathy Fentroy's lawsuit against her former employer, Dillard's Texas Operating Limited Partnership (Dillard's), and Fentroy's former supervisor, Harry Williams. Fentroy initially sued Dillard's and Williams for employment discrimination based on race and disability, intentional infliction of emotional distress, and failure to comply with the notice provisions of the Family and Medical Leave Act. The district court granted summary judgment on most of these claims, and for Williams, but determined that Fentroy had raised issues of material fact regarding her Title VII claim. Fentroy's complaint described conduct amounting to disparate treatment on the basis of race, and alleged that the conduct subjected her to a hostile work environment. Although Fentroy's complaint was somewhat confusing, the district court characterized Fentroy's Title VII claim as a hostile work environment claim. The case proceeded to trial against Dillard's on that theory- i.e., hostile work environment.

The jury found that Dillard's had subjected Fentroy to a hostile work environment on account of her race, and awarded Fentroy $24,000.00 in compensatory damages. The jury also found that Dillard's acted with malice or reckless indifference to Fentroy's federally-protected rights, and awarded Fentroy $72,000.00 in punitive damages. After entering a judgment consistent with the jury's verdict, the district court acted on Dillard's motion for judgment as a matter of law, and set aside the punitive damages award. Dillard's then filed a notice of appeal to challenge the jury's liability finding and the compensatory damages award.[3] Fentroy also filed a notice of appeal to challenge the setting-aside of the punitive damages award.[4] This opinion considers both appeals.

Dillard's Appeal

Dillard's presents eight issues for review. This court, however, need only consider one issue to resolve Dillard's

appeal-that is, whether the district court erred in failing to grant Dillard's motion for judgment as a matter of law as to the sufficiency of the evidence to support the jury's finding of liability for a hostile work environment.

This court reviews the district court's denial of a motion for judgment as a matter of law under the same standard that the district court uses in considering the motion at trial. See Conkling v. Turner, 18 F.3d 1285, 1300 (5th Cir. 1994). Judgment as a matter of law is proper if after a party has been fully heard by the jury on a given issue, "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." FED. R. Civ. P. 50 (a). In evaluating the motion, the district court must view the entire trial record in the light most favorable to the non-movant, drawing all factual inferences in favor of the non-moving party, and leaving credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts to the jury. See Conkling, 18 F.3d at 1300. "The 'decision to grant a directed verdict . . . is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury.'" Id. at 300-01 (citations omitted). Consequently, this court must determine whether sufficient evidence was presented during trial to permit a reasonable jury to find for Fentroy on the hostile work environment question.

To prove that she was subjected to a racially hostile work environment, Fentroy was required to prove: (1) that she belongs to a protected class, (2) that she was subject to unwelcome racial harassment, (3) that the harassment was based on race, (4) that the harassment affected a "term, condition, or privilege" of employment, and (5) that Dillard's knew or should have known of the harassment and failed to take prompt remedial action. See Shepherd v. Comptroller of Pub. Accounts of State of Tex.,168 F.3d 871, 873 (5th Cir. s999). In addition, Fentroy had to show: (1) racially discriminatory intimidation, ridicule and insults, which were (2) sufficiently severe or pervasive that they (3) altered the

conditions of employment and (4) created art abusive working environment. See DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995).

> Whether an environment is "hostile" or "abusive" is determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. To be actionable, the challenged conduct must be both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so.

Shepherd, 168 F.3d at 874. As a result, this court must review the evidence in the light most favorable to Fentroy to determine whether Fentroy met her burden.

Fentroy based her employment discrimination claim upon a chronology of incidents in which she contends she was treated differently from her white co-workers. These incidents allegedly began in 1989 and continued until the end of Fentroy's employment in 1996. Although many of these incidents occurred well outside the 300-days limitations period that applies to an employment discrimination case, the incidents simply do not support a hostile work environment claim even when viewed in the light most favorable to Fentroy.

For example, Fentroy testified that she served as an Area Sales Manager (ASM) for Dillard's Woodlands store. She described how she played an instrumental role in opening the new store in September 1994. Fentroy explained that in January 1995, the store conducted an inventory and that her department had a big shortage. Fentroy testified that she was counseled regarding the shortage, and that she felt that she

was given an ultimatum to turn the inventory around or that she would be terminated or moved to another position. Although Fentroy stated that other ASMs were counseled for shortages in their departments, she asserted that Williams pressured her about improving the inventory in her department. Fentroy also testified that she was disciplined more harshly than other ASMs for inventory shortages. She asserted that even though she had a good inventory the following July, store managers criticized her even more harshly than before. Fentroy opined that her treatment was due to her race-that is, because she is black.

Fentroy also explained that after being on medical leave for over twelve weeks, she was demoted upon her return and reassigned as a sales associate. She complained that white associates and managers who returned from medical leave were not demoted. To support this position, Fentroy used company documents she obtained from Dillard's during discovery to demonstrate that white employees were permitted to return from medical leave and
return to work in the same position they held prior to medical leave.

Fentroy also asserted that lesser qualified white employees were promoted and that she was not promoted because she is black. Fentroy used discovery documents to demonstrate that white employees were promoted and received bigger pay raises than she did. Fentroy attributed this treatment to her race.

Denine Ingram, a black individual who worked at the store during Fentroy's employment, testified that the store's operations manager told her to hire employees to reflect the store's community. Ingram, an ASM at the time, stated that the store's community was mostly Caucasian, and that the operations manager had refused to hire a qualified black applicant that she recommended.

Sharon Green, a sales associate in Fentroy's department, testified that the January 1995 inventory showed almost a half

million dollars in shortage. Green speculated that the construction workers that were still working in the store took much of the merchandise reflected by the shortage.

Felicia Tillery, a former employee, testified that the majority of black applicants she recommended for third interviews were not selected for employment. Tillery explained that she arrived at the Woodlands store a few months after it opened, and observed that Fentroy was more scrutinized than other ASMs. She described an incident in which she contended Williams told her that Fentroy was unfit to be an ASM, and that Williams told her to watch Fentroy after she returned from medical leave. Tillery also stated that the operations manager told her to place applications from black applicants aside, and that the store must hire sales associates that fit the community. Tillery also stated that Williams told her that he did not what any more black employees because it made the store look dingy, and that he expressed unhappiness with Fentroy when he walked through the store prior to an inventory.

The testimony described above is characterized by complaints of disparate treatment-that is, that Fentroy was treated less favorably than other employees because she is black. The essence of a disparate treatment claim is different treatment. Disparate treatment occurs when "[t]he employer simply treats some people less favorably than others because of their race." Teamsters v. United States, 431 U.S. 324, 335 n.15. When viewed in the light most favorable to Fentroy, Fentroy showed that she received smaller raises than white employees, that she was not permitted to return to her old position when she returned from medical leave even though white employees were permitted to return to their positions, and that white employees were promoted and that she was not. In other words, Fentroy presented evidence that Dillard's treated her differently than white employees. Although this evidence may support a jury verdict for a disparate treatment claim, the jury was not asked whether Fentroy was subjected to disparate treatment because of her race. Instead, the jury was asked whether Dillard's "subjected Ms. Fentroy to a

hostile or abusive work environment on account of her race?" The evidence discussed above does not support this question.

Notably, no evidence exists that Fentroy was subjected to racially discriminatory intimidation, ridicule or insult. No evidence indicates that Fentroy was the subject of racial harassment. Even Tillery, who was arguably the most damaging witness for Fentroy, testified that she was not aware of anyone making any remarks about Fentroy's race, and that she did not know of any facts that suggested that Williams wanted Fentroy gone because she was African American. Without evidence of racial harassment, there is no evidence to support the jury's verdict. As a result, the district court erred by denying Dillard's motion for judgment as a matter of law.

Fentroy's Appeal

Fentroy appealed the district court's judgment setting aside the jury's punitive damages award. This court, however, has determined that no evidence exists to support the jury's liability finding. Without a finding of liability, no basis exists for a damages award. As a result, the district court's amended judgment awarding compensatory damages must be reversed.

Conclusion

Having determined that no evidence exists to support the jury's liability finding, and that the district court erred by denying Dillard's motion for judgment as a matter of law, this court must reverse the district court's judgment and render judgment as a matter of law in favor of Dillard's. See Krystek v. Univ. of S. Miss., 164 F.3d 251, 259 (5th Cir. 1999). Although arguably Fentroy may have been entitled to a new trial for a disparate impact claim, Fentroy never challenged the district court's summary judgment order. As a result, she waived the opportunity to re-try her case on a disparate impact theory. Accordingly, this court shall REVERSE the district court's amended judgment, signed on May 23, 2000, and RENDER judgment for Dillard's .

Footnotes

[1] District Judge of the Western District of Texas, sitting by designation.

[2] Pursuant to 5th Cir K. 47.5, the court has determined that this opinion should not be published and is not precedent under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[3] Appeal No. 00-20552 applies to Dillard's challenge.

[4] Appeal No. 00-20990 applies to Fentroy's challenge.

CIVIL ACTION NO. H-97-3213

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KATHY W. FENTROY,
Plaintiff,

v.

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP,
Defendant.

Entered May 24, 2000

ORDER

Pending before the Court is the Renewed Motion for Judgment as a Matter of Law, Alternative Motion to Alter or Amend Judgment or Motion for New Trial, and Supporting Brief (Instrument #90) filed by Defendants, Dillards Texas Operating Limited Partnership and Barry Williams. Having considered the motion, submissions on file, and the applicable law, the Court determines that the motion should be granted in part and denied in part.

Plaintiff Kathy W. Fentroy ("Fentroy") sued her former employer, Dillards Texas Operating Limited Partnership ("Dillards"), and her former supervisor, Harry Williams (collectively "Defendants"), for constructive discharge and hostile work environment, in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq. ("Title VII"), disparate treatment, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12112, et seq. ("ADA"), intentional infliction of emotional distress, and a violation of the Family Medical Leave Act, 29 U.S.C. § 2601, et seq. ("FMLA"). Upon motion by Defendants, the Court granted summary judgment in part, dismissing Williams from the lawsuit and allowing Fentroy to

go to trial only on her hostile work environment claim. A jury found for Fentroy and awarded compensatory damages in the amount of $24,000 .00 and punitive damages in the amount of $72,000.00. Dillards now moves for judgment as a matter of law in its favor, or alternatively, for the Court to alter or amend the judgment, or grant a new trial.

Dillards moves for relief on the following five grounds:

(1) that some of the acts upon which Fentroy bases her claims are barred by the statute of limitations;

(2) that there is insufficient evidence of discrimination to support the verdict;

(3) that certain evidence was improperly admitted at trial;

(4) that there is insufficient evidence of causation to support the verdict; and

(5) that there is Sufficient evidence to support an award of punitive damages.

The Court finds that Dillards is not entitled to relief based upon the first four grounds. However, the Court finds that judgment as a matter of law in favor of Dillards is appropriate regarding the award of punitive damages for the following reasons.

Prior to 1991, Title VII claimants were not entitled to the recovery of punitive damages. See e.g. Davis v. City of Dallas, 748 F. Supp. 1165, 1179 (N.D. Tex. 1990). The Civil Rights Act of 1991 added 42 U.S.C. § 1981a, which specifically allows for the recovery of punitive damages in Title VII cases. However, in order to recover punitive damages, a claimant must show that the defendant engaged "in a discriminatory practice or discriminatory practices with malice or with reckless

indifference to the federally protected rights of [the claimant]." 42 U.S.C. § 1981a(b)(1). Thus, in the instant case, in order to recover punitive damages, Fentroy was required to show that Dillards discriminated against her based upon her race and with malice or reckless indifference for her federally protected rights.

The Supreme Court has recently defined the terms "malice" and "reckless indifference" in the Title VII context. See Kolstad v. American Dental Ass'n, 119 S.Ct. 2125, 2124-25 (1999). "Malice" is defined as "evil motive or intent." Id. (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)). "Reckless indifference" is defined as "discriminat[ing] in the face of a perceived risk that [the employer's] actions will violate federal law...." Id. After reviewing the record, the Court finds that there is no evidence to support the jury's determination that Dillards acted with suck malice or reckless disregard. Accordingly, the Court hereby

ORDERS that Defendant's Renewed Motion for Judgment as a Matter of Law, Alternative Motion to Alter or Amend Judgment or Motion for New Trial, and Supporting Brief (Instrument #90) is GRANTED IN PART AND DENTED IN PART. The jury's award of punitive damages in the amount of $72,000.00 is set aside. All relief not expressly granted herein is DENIED.

SIGNED at Houston, Texas, on this the 19 day of May, 2000.
DAVID HITTNER
United States District Judge

CIVIL ACTION NO. H-97-3213

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KATHY W. FENTROY,
Plaintiff,

v.

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP,
Defendant.

Entered May 24, 2000

AMENDED FINAL JUDGMENT

As the Court has granted in part Dillard's Renewed Motion for Judgment as a Matter of Law, Alternative Motion to Alter or Amend Judgment or Motion for New Trial, and. Supporting Brief, and set aside the jury's award of $72,000.00 in punitive damages, the Court hereby

ORDERS that judgment be entered in favor of the Plaintiff and against Defendant Dillards in the amount of $24,000.00 in compensatory damages.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas on this the 23 day of May, 2000.

DAVID HITTNER
United States District Judge

CIVIL ACTION NO. H-97-3213

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KATHY W. FENTROY,
Plaintiff,

v.

DILLARDS TEXAS OPERATING LIMITED PARTNERSHIP
and HARRY WILLIAMS,
Defendants.

Entered June 18, 1999

MEMORANDUM OPINON AND ORDER

This employment discrimination case is before the Court on Defendants' Motion for Summary Judgment (Instrument No. 20).[1] Based on the Court's thorough review of the full record. and the application of governing legal authorities, the Court grants Defendants' Motion as to all claims against Defendant Harry Williams, and as to the Americans With Disabilities ("ADA") claim the intentional infliction of emotional distress claim, and the Family and Medical Leave Act ("FMLA") claim against Defendant Dillard Texas Operating Limited Partnership ("Dillard's"). The Court denies the motions to the Title VII claim against Dillard's.

I. FACTUAL BACKGROUND

Plaintiff Kathy W. Fentroy, an African-American female, began working as a sales associate at Joske's on a part-time basis in 1980. Upon her graduation from college, Plaintiff began to work at Joske's on a fill-time basis.

Dillard's purchased Joske's in 1987, by which time Plaintiff had been promoted to Area Sales Manager ("ASM"). During

her career with Dillard's, Plaintiff worked in many different departments in a number of different store locations. In September 1994, Plaintiff was assigned to help open the new Dillard's store in The Woodlands Mall. Defendant Williams was her Store Manager.

Plaintiff recites a number of numerous events during her career with Dillard's. Plaintiff complains that she was treated differently because of her race, that she received smaller raises than her white coworkers, that she was not considered for promotions which were awarded to less-qualified white employees, that she was denied the opportunity to work in certain departments because of her race, that she was given less desirable assignments, that she was disciplined more severely for inventory shortages than similarly-situated white employees, and that she was criticized frequently.

Plaintiff was absent from work on sick leave in early September 1995. She attempted to return to work on September 18, 1995, but upon her arrival she began to shake and cry. As a result Plaintiff continued to be on an extended leave of absence until December 11, 1995. After she had been on leave for more than twelve weeks, Dillard's filled Plaintiffs ASM position. When Plaintiff returned to work on December 11, 1995, Williams determined that there were no ASM positions available. Plaintiff was assigned to a sales associate position in the ladies' ready-to-wear department, a commissioned sales position.

On January 25, 1996, Plaintiff submitted her resignation. In accordance with Plaintiff's notice of resignation, her employment with Dillard's ended February 9, 1996.

Plaintiff filed her charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on May31, 1996. Plaintiff alleged discrimination on the basis of race, sex and a perceived disability. After receiving her Notice of Right to Sue, Plaintiff filed this lawsuit on September 24, 1997. Plaintiff alleged that Dillard's and Williams violated Title VII, the ADA, and the FMLA. Plaintiff also asserted a cause of

action for intentional infliction of emotional distress.

II. SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Sanders v. Casa View Baptist Church, 134 F.3d 331, 334 (5th Cir.), cert. denied, 119 S. Ct. 161 (1998); Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en bane). The facts are to be reviewed with all inferences drawn in favor of the party opposing the motion. Bozé v. Branstetter, 912 F.2d 801, 804 (5th Cir. 1990).

The party moving for summary judgment has the initial burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial, lithe movant meets this initial burden, the burden shifts to the nonmovant to demonstrate with "significant probative evidence" that there is an issue of material fact so as to warrant a trial. Texas Manufactured Housing Ass'n v. Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996), cert. denied, 521 U.S. 1112 (1997); Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 161(5th Cir.). cert. denied, 519 U.S. 1029 (1996).

"Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless." Duplantis v. Shell Offshore. Inc., 948 F.2d 187, 192 (5th Cir. 1991). Rumors, speculation, hearsay and other information which would be excluded at trial cannot be considered in ruling on a motion for summary judgment. Fowler v. Smith, 68 F.3d 124, 126 (5th Cir. 1995).

"Summary judgment is a marvelous tool when used correctly. It can cut to the heart of disputed legal issues and resolve them, so long as the underlying material facts are undisputed. However, summary judgment is completely inappropriate when a law suit turns on a disputed question of material fact" Equal Employment Opportunity Comm. v. Brown & Root Inc.. 688 F.2d 338, 339 (5th Cit 1982). See also Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 765 (5th Cit 1996) (summary judgment inappropriate where genuine issue of material fact exists).

III. STATUTORY CLAIMS AGAINST HARRY WILLIAMS

It is well-established in the Fifth Circuit that employees may not be sued in their individual capacities for damages under Title VII. See Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. cert. denied, 513 U.S. 1015 (1994). Similarly, an individual employee in his official capacity is not a proper Title VII co-defendant with the corporate employer, Indest v. Freeman Decorating, Inc., 164 F.3d 258, 262 (5th Cir. 1999).

Similar rules apply to claims against individual employees under the ADA. See Kacher v. Houston Community College System, 974 F. Supp. 615, 619 (S.D. Tex. 1997). Plaintiff agrees that Williams is not a proper defendant under the ADA and Title VII.

Plaintiff argues, however, that Williams is a proper defendant under the FMLA. The only authority Plaintiff cites in support of her argument is a decision from the Central District of California. The Court finds Plaintiff's argument unpersuasive. Title VII, the ADA, and the FMLA are frequently asserted together and construed similarly. Consequently, the authority regarding individual liability under Title VII and the ADA applies equally to FMLA claims. Seaman v C.S.P.H., Inc., 1997 WL 361652 *2 (N.D. Tex. 1997).

Williams is entitled to summary judgment on Plaintiff's Title VII, ADA, and FMLA claims.

IV. CLAIMS AGAINST DILLARD'S

A. Title VII Claim

Plaintiff alleges that she was subjected to a racially hostile work environment, that she was denied raises and promotions on the basis of her race, and that she was demoted because she is African-American Dillard's argues that Plaintiff cannot present evidence of events which occurred more than 300 days before she fled her EEOC charge, that Plaintiff was not constructively discharged, and that Plaintiff fails to raise a genuine issue of material fact to support her Title VII claim.

Events Occurring More Than 300 Days Before EEOC Charge. Dillard's argues that Plaintiff cannot present evidence of alleged racial harassment occurring more then 300 days before she filed her EEOC charge. Plaintiff alleges instances of sexual harassment which occurred within the 300-day period immediately before she filed her EEOC charge. Plaintiff also alleges and presents evidence that the racial harassment was ongoing, was similar in nature, and was a persistent condition in her workplace, As a result, Plaintiff's hostile environment claim is subject to the continuing violation doctrine. See Huckabay v. Moore, 142 F.3d 233, 239 (5th Cir, 1998). The Court will receive evidence of racially harassing incidents that occurred more than 300 days before Plaintiff filed her EEOC claim,

Constructive Discharge Claim- In order to prove constructive discharge, Plaintiff's working conditions must be so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign. See Webb v. Cardiothoracic Surgery Associates, 139 F.3d 532, 539 (5th Cir. 1998); Ward v. Bechtel Corp., 102 F.3d 199, 202(5th Cir. 1997); Landgraf v. USI Film Prods., 968 F.2d 427,429-31(5th Cir. 1992), aff'd 511 U.S. 244 (1994). Although the conditions described by Plaintiff may well support her claim of a racially hostile and discriminatory environment, Plaintiff must demonstrate "'a greater severity or pervasiveness of harassment than the

minimum required to prove a hostile work environment." Weller v. Citation Oil & Gas Co., S4 F.3d 191, 195 a7 (5th Cir. 1996), cert. denied, 519 U.S. 1055 (1997); accord Benningfield v. City of Houston, 157 F.3d 369, 378 (5th Cir. 1998). Plaintiff's "resignation must have been reasonable under all the circumstances." Barrow v. New Orleans 3.8. Ass'n. 10 F.3d 292,297 (5th Cir. 1994). The conditions described by Plaintiff are not such that a reasonable person would have fell compelled to resign. The Court grants the Motion for Summary Judgment on Plaintiff's constructive discharge claim.

Racially Hostile and Discriminatory Work Environment — Plaintiff alleges and presents evidence that she was persistently subjected to a work environment in which she was harassed and discriminated against because of her race. Plaintiff presents evidence that less-qualified white employees were given promotions, larger raises, and more desirable assignments which Plaintiff had requested. Plaintiff presents evidence that she was required to provide documentation for absences while white co-workers were not required to provide documentation for similar absences. Plaintiff presents evidence that similarly-situated white employees who were on leave were returned to their regular ASM position after their leave terminated, while Plaintiff was assigned to an inferior position. Plaintiff presents evidence that she was criticized more harshly than similarly-situated white employees.

Plaintiff's evidence raises a genuine issue of material fact regarding her Title VII claim Dillard's is not entitled to summary judgment on this claim.

B. ADA Claim

In 1990, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a

disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees,.. . and other terms, conditions, and privileges of employment." Id. § 12112(a). The ADA defines "disability," as either: (A) a mental or physical impairment that substantially limits one or more major life activities in such individual; (B) a record of such impairment or (C) being regarded as having such impairment. 42 U.S.C. § 12102(2XA), (B), and (C).

Plaintiff alleges that Dillard's regarded her as having a disability. Plaintiff argues that there exists a genuine issue of material fact on this claim because (1) she was on medical leave; (2) she was told that she had been "out sick" a long time; and (3) Dillard's "offered her the option of 2 lower volume store' while she [was] in apparent distress." Plaintiff's Response, at 25.

"For an employer to regard an impairment as substantially limiting work, the employer must regard an individual as significantly restricted in his ability to perform a class or broad range of jobs." Hamilton v. Southwestern Bell Telephone Co., 236 F.3d 1047, 1051-52 (5th Cir. 1998); Price v. Marathon Cheese Corp., 119 F.3d 330,336(5th Cit 1997). The Fifth Circuit has held clearly and repeatedly that "an employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job.'

Pryor r. Trane Co., 138 F.3d 1024, 1028 (5th Cir. 1998) (quoting Ellison v. Software Spectrum, Inc. 85 F3d 187, 192 (5th Cir. 1996)); Price, 119 F.3d at 336; Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 806 (5th Cir. 1997), cert. denied, 118 & Ct. 1050 (1998).

It is undisputed in this case that Dillard's offered Plaintiff alternate positions with the company and continued to employ Plaintiff after being notified of Plaintiff's depression. Plaintiff has failed to raise a genuine issue of material fact regarding her claim that Dillard's perceived or treated her as

having a disability as defined by the ADA. Dillard's is entitled to summary judgment on Plaintiff's ADA claim.

C. Intentional Inflict ion of Emotional Distress Claim

In order to prevail on a claim of intentional infliction of emotional distress, Plaintiff must establish that Defendants acted intentionally or recklessly, that their conduct was extreme and outrageous, and that their actions caused severe emotional distress to Plaintiff. Burden v. General Dynamics Corp., 60 F3d 213,218(5th Cir. 1995); MacArthur v. University of Texas Health Center. 45 F.3d 890, 898 (5th Cit 1995); Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993). The Court concludes that Plaintiff has failed to satisfy the second requirement.

Whether conduct is extreme and outrageous is initially a question of law for the Court. Danawala v. Houston Lighting & Power Co., 14 F.3d 251, 256 (5th Cir. 1993); Wornick, 856 S.W.2d at 734. Conduct is sufficientiy outrageous only if it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." MacArthur, 45 F.3d at 898. "Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." Ugalde v. W.A.

McKenzie Asphalt Co., 990 F2d 239,243(5th Cir. 1993) (supervisor's repeated reference to Ugalde as a "wetback" did not constitute extreme and outrageous conduct) A claim for intentional infliction of emotional distress will not lie for "mere employment disputes," MacArthur, 45 F,3d at 898. See also Diamond Shamrock Refining and Marketing Co. v. Mendez, 844 S.W2d 198, 202 (Tex. 1992) (allegations that employer terminated Plaintiffs employment and "falsely depict[ed] him in the community as a thief' did not constitute conduct which is outrageous).

In this case, Plaintiff alleges that she was denied promotions and raises that she was required to provide documentary

proof when she requested medical or funeral leave, that she was given inferior assignments, and that she was demoted. These allegations, taken as true, do not as a matter of law rise to the level of extreme and outrageous conduct required to support a claim of intentional infliction of emotional distress. The alleged behavior is significantly less egregious than conduct found not to constitute intentional infliction of emotional distress in other employment cases.

Humphreys v. Medical Towers. Ltd., 893 F. Supp. 672, 681 (SD. Tex. 1995), 100 F.3d 952 (5th Cit. 1996), and cases cited therein. "Only in the most unusual of employment cases does the conduct move out of the 'realm of an ordinary employment dispute' and into the classification of extreme and outrageous as required for the tort of intentional infliction of emotional distress.' Porterfield v. Galen Hospital Corp., 948 S.W.2d 916, 920-21 (Tex. App.-San Antonio 1997, writ denied) (quoting Humphreys, 893 F. Supp. at 681).

Defendants Williams and Dillard's are entitled to summary judgment on Plaintiff's intentional infliction of emotional distress claim.

D. FMLA Claim

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 at seq. (1994) ("FMLA") provides eligible employees up to 12 weeks of unpaid sick leave each year due to a serious health condition that makes them unable to perform the functions of Their position. 29 U.S.C. § 2612 (a)(1)(D); Satterfield v. Wal-Mart Stores. 135 F.3d 973, 975 (5th Cit.), cert. denied, 119 S. Ct. 72 (1998). The FMLA provides further that upon return from leave an employee shall be restored to the position of employment he held when the leave commenced or to an equivalent position. 29 U.S.C. § 2614(a); Nero v. Industrial Molding Corp., 167 F.3d 921,925 (5th Cir. 1999). Plaintiff alleges that she was demoted when she returned from FMLA leave.

Plaintiff does not dispute that she was absent more than 12 weeks. Plaintiff has presented no evidence that Dillard's filled her ASM position before the expiration of the 12-week FMLA period. Plaintiff alleges that an ASM position at the Greenspoint Mall store was available because the Greenspoint ASM was on leave, but does not present evidence that the (Greenspoint ASM position was available under the provisions of the FMLA. Indeed, the Greenspoint ASM had been on FMLA leave for less than twelve weeks and, as a result, the position was not available for Plaintiff in December 1995. Plaintiff also argues that she should have been given a different comparable position, the Assistant ASM position at The Woodlands store. There is no FMLA requirement that employees returning after more than twelve weeks be permitted to select their choice of alternative positions.

Plaintiff also alleges that she was not given proper notice that the leave would be classified as FMLA leave. The uncontroverted evidence in the record establishes that Dillard's had a written FMLA policy which provided unequivocally that "Vacation and/or paid sick leave/salary continuation, if available, will constitute a portion of any leave requested under the Family and Medical Leave Act of 1993." Plaintiff signed an acknowledgment that she received this notice on November 2, 1994. As a result, Plaintiffs evidence does not raise a genuine issue of material fad regarding her allegation that she was not given proper notice under the FMLA.

Plaintiff has failed to present evidence to support her FMLA at Dillard's is entitled to summary judgment on this claim.

V. CONCLUSION AND ORDER

Plaintiff's allegations do not, as a matter of law, rise to the level of outrageous conduct sufficient to support her intentional infliction of emotional distress claim. Williams is not a proper defendant to the Title VII, ADA or FMLA claims. Plaintiff has failed to present evidence which raises a genuine

issue of material fact regarding her ADA and FMLA claims, but the evidence raises a fact dispute regarding her Title VII claim. Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (Instrument No. 20) is DENIED as to Plaintiff's Title VII claim against Dillard's and GRANTED in all other respects.

Plaintiffs Motion for Leave to File Supplement (Instrument No. 45) is GRANTED.

SIGNED this 17 day of June, 1999, at Houston Texas.
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

Footnotes

[1] Also pending is Plaintiff's request to supplement her response to Defendants' motion (Instrument No. 45). The Court grants this motion.

No. 00-20552

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KATHY W. FENTROY,
Plaintiff-Appellee – Cross-Appellant,

versus

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP, ET AL
Defendants.

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP
Defendant-Appellant – Cross-Appellee.

No. 00-20990

KATHY W. FENTROY,
Plaintiff-Appellee,

versus

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP, ET AL
Defendants,

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP
Defendant-Appellant.

Appeals from the United States District Court for the
Southern District of Texas, Houston

Before DAVIS and JONES, Circuit Judges, and PRADO,[1]
District Judge.

Filed December 6, 2001

ON PETITION FOR REHEARING

Before DAVIS and JONES, Circuit Judges, and PRADO*, District Judge. PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied
ENTERED FOR THE COURT:

United States Circuit Judge

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Footnotes

* District Judge of the Western District of Texas, sitting by designation.

Supreme Court U.S.
FILED
MAY 30 2002
OFFICE OF THE CLERK

No. 01-1555

IN THE

Supreme Court of the United States

KATHY W. FENTROY,

Petitioner,

v.

DILLARD TEXAS OPERATING LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S ALTERNATIVE STATEMENT OF QUESTION PRESENTED

Did the Fifth Circuit reversibly err in determining that the evidence presented at trial was insufficient to support a claim for racially hostile working environment?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of the case includes the names of all parties, except that Respondent's proper name is "Dillard Texas Operating Limited Partnership." The only affiliated entity which is publicly traded is Dillard's, Inc., the general partner of Dillard Texas Operating Limited Partnership.

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COUNTERSTATEMENT OF THE CASE

Throughout all phases of this case leading up to trial, this was not a racial harassment case; it was a disparate treatment case. It was pled as a disparate treatment case, discovery was conducted by both parties as if it were a disparate treatment case, and both parties' summary judgment filings treated it as a disparate treatment case. However, apparently as a result of her interpretation of the trial court's summary judgment ruling, Petitioner chose not to present disparate treatment issues to the jury at trial; rather, the only issue presented to the jury was whether the Petitioner had been subjected to a racially hostile working environment.[1]

Despite the fact that Petitioner chose to assert only a racial harassment theory at trial, the fact pattern illustrated by her evidence did not fit that legal theory. Specifically, at trial, Petitioner, who worked as an Area Sales Manager over the Men's Department at the Dillard's department store in the Woodlands, Texas, testified about a litany of events which occurred over a period of seven years and which she considered to be negative,[2] but those events did not involve conduct that can be described as "harassment." Rather, the

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1. Supreme Court Rule 15.2 obligates Dillard's to point out any perceived misstatements contained in the Petition for a writ. The Petition for a writ states that the jury instructions were submitted "without objection," which is the first of many misstatements (others of which are noted in the numerous footnotes in this Brief). Both parties voiced numerous objections to the jury instructions, both verbally and in writing.

2. Although Petitioner testified about a number of events which she considered to be negative, nothing in the record supports the statement on page 4 of the Petition that she was "the only black ASM."

events described by Petitioner involved allegations consistent with a disparate treatment theory.[3] Those events are adequately summarized, albeit in the light most favorable to Petitioner, in the portion of the Fifth Circuit opinion which appears on pages 4a through 6a of the Appendix to Petition for a writ (hereinafter cited as, "App., p. __").[4]

The complaints Petitioner presented at trial basically fall into four categories. She complained about promotional decisions, even though the evidence showed that the only

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3. By acknowledging that Petitioner's allegations are consistent with a disparate treatment theory, Respondent does not concede that Petitioner's evidence was sufficient to establish violation of Title VII under a disparate treatment theory. In fact, Petitioner misinterprets the Fifth Circuit's opinion when she makes the following statements in her Petition for a writ: "The Court of Appeals found sufficient evidence of disparate treatment" and "The Court of Appeals agreed that Fentroy was subjected to disparate treatment because of her race." The Court of Appeals made no such affirmative findings. At best, it held open the possibility, for argument's sake, that the evidence presented at trial might have been sufficient to support a disparate treatment theory of liability; however, it did not make a specific holding that a sufficient showing of disparate treatment had, in fact, been made. Because Petitioner misreads the Fifth Circuit's opinion in this regard, her second and third "Questions Presented" are improperly framed, as they are based on conclusions which have not been established.

4. The Fifth Circuit's recitation of the facts makes clear that Petitioner is wrong when she states on page 17 of the Petition for a Writ that the Fifth Circuit "limit[ed] its review of the evidence to the [sic] Tillery's testimony that she was not aware of remarks about Fentroy's race or that Williams wanted Fentroy gone because she was African American." The Fifth Circuit reviewed the totality of the circumstances and made specific mention of Tillery only to illustrate that even the witness it considered "arguably the most damaging" did not testify about any facts that could be considered harassment.

time she specifically requested a promotion, she received one less than two months later. She complained that other employees, on occasion (and usually at different stores), received larger pay increases than she received; however, the evidence also showed that, at all times, Petitioner was more highly compensated than any of the employees to whom she compared herself.[5] She complained about the job assignment she received upon returning from a leave of absence that exceeded twelve (12) weeks;[6] however, she was unable to establish that any other employee was treated differently under similar circumstances.[7] Finally, she complained about various miscellaneous occurrences, such as having an assistant "taken away,"[8] being told she needed to improve inventory results, being disciplined for unsatisfactory inventory results,[9] being provided with fewer hours upon

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5. The fact that Petitioner was always more highly compensated than any of the employees to whom she compared herself renders the statement on page 4 of the Petition for a Writ that "some white ASM's received more money" a misstatement.

6. It is a misstatement to say that Petitioner's job assignment upon return from leave of absence resulted in "a cut in pay" of approximately $1,400 per month.

7. Because there was no evidence that any other employee retained their position under circumstances similar to Petitioner's, any statements to the contrary in the Petition for a writ are misstatements, including statements regarding Candis Gatewood.

8. Petitioner's "belief" that another ASM had an assistant is not supported by the record.

9. The Petition for a writ contains several misstatement with regard to the inventory situation. Petitioner was not "in so many words

(Cont'd)

return from leave of absence than she would have desired, having supervisors override her decisions on sales returns, and not being selected as a store auditor during the January, 1996 inventory. It should be clear that, although Petitioner "opined that her treatment was due to her race" (*see* App., p. 5a), all of the events she described are racially neutral on their face, they were sporadic and infrequent (occurring, at best, at the rate of one incident every couple of months), and they do not involve any type of intimidation, insult, ridicule, or any other conduct that could legitimately be described as harassment.[10] Accordingly, the Fifth Circuit held that Petitioner failed to establish the elements of a racially hostile working environment.

(Cont'd)
accused of theft." In fact, she admitted that the word theft was never used. Also, any statement indicating that white employees with inventory shortages were not treated the same as Petitioner is a misstatement. They were treated so much the same that even the respective disciplinary documents contained the exact same wording. Finally, there was never any testimony specifically stating that "white ASM's received a lot more damage dollars than black ASM's," or that any black ASM ever failed an inventory based on failure to receive damage dollars.

10. Based on the actual facts presented, any conclusory allegation contained in the Petition for a writ that Petitioner was "harassed," "intimidated," "ridiculed," or "insulted" is a misstatement.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit's decision in no way conflicts with prior decisions of the Supreme Court.

Although her arguments are not very clear, it appears that Petitioner attempts to argue that the Fifth Circuit's decision in this case conflicts with this Court's opinions in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). However, even a cursory examination of the Fifth Circuit's opinion reflects that it in no way conflicts with either *Meritor* or *Harris*.

The gravamen of this Court's decision in *Meritor* was its holding "that a claim of 'hostile environment' sex discrimination is actionable under Title VII. . . ." *Id.*, 477 U.S. at 73, 106 S. Ct. at 2408.[11] Therefore, in order for the Fifth Circuit's opinion to be in conflict with this Court's opinion in *Meritor*, the Fifth Circuit would have had to hold that a claim of "hostile environment" race discrimination is not actionable under Title VII. Of course, the Fifth Circuit did not make such a holding. In fact, it expressly recognized that racial harassment is actionable under Title VII, it set forth the elements which Petitioner was required to prove in order to establish her claim, and it ultimately determined that she had failed to establish those required elements. (App., pp. 3a-4a). Thus, far from conflicting with this Court's opinion in *Meritor*, the Fifth Circuit's opinion is entirely consistent with *Meritor*.

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11. Although this case involves claims of racial harassment and *Meritor* involved claims of sexual harassment, Dillard's does not dispute that a claim of "hostile environment" racial discrimination is also actionable under Title VII.

Similarly, the Fifth Circuit's opinion is entirely consistent with *Harris*. The gravamen of this Court's holding in *Harris* was its recognition that no psychological injury is necessary in order for a plaintiff to prevail in a "hostile work environment" case under Title VII. *Harris*, 510 U.S. at 22, 114 S. Ct. at 371. Accordingly, the Fifth Circuit's opinion in this case cannot be found to conflict with the Supreme Court's opinion in *Harris* unless the Fifth Circuit expressly found that psychological injury was necessary in order to prevail under a hostile work environment theory. The Fifth Circuit made no such holding; therefore, its opinion in no way conflicts with prior decisions of this Court.

II. The Fifth Circuit's decision is not in conflict with any of the decisions of other Courts of Appeals referenced by Petitioner but is, instead, consistent with the only other Court of Appeals to have considered a similar theory of the case.

Petitioner references several decisions of other Courts of Appeals in a section of her Petition which is entitled "Other Circuit Courts." Specifically, she references *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998); *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533 (10th Cir. 1994); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); and *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). She references each of these cases for the general proposition that discriminatorily hostile or abusive conduct directed at someone other than the plaintiff can be probative in determining whether a discriminatorily hostile or abusive

work environment exists. Nothing in the Fifth Circuit's opinion is inconsistent with that proposition.[12]

In fact, the Fifth Circuit's opinion clearly demonstrates that it properly reviewed the "totality of the circumstances" which Petitioner urges. It specifically quotes the "totality of circumstances" test (App., p. 4a) and contains specific references to the trial evidence relating to treatment of other minority employees. (App. pp. 5a-6a). The real essence of the Petition for a writ rests in Petitioner's simple disagreement with the conclusion drawn by the Fifth Circuit after reviewing the totality of the circumstances that no evidence of racial harassment exists. Thus, in reality, Petitioner is not arguing that the Fifth Circuit's opinion is inconsistent with decisions of other circuits; rather, she is arguing that the Fifth Circuit made erroneous factual findings or misapplied a properly stated rule of law. Even if she were correct in those assertions, Supreme Court Rule 10 demonstrates that erroneous factual findings or misapplication of a properly stated rule of law are generally insufficient to warrant a grant of certiorari.

Of course, the Fifth Circuit did not make any erroneous factual findings, nor did it misapply the law. In fact, Petitioner is bound in this case by the "Agreed Applicable Propositions

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12. Because nothing in the Fifth Circuit's opinion is inconsistent with the proposition that discriminatorily hostile or abusive conduct directed at someone other than the plaintiff can be probative in determining whether a discriminatorily hostile or abusive working environment exists, Petitioner's first "Question Presented" is also improperly framed. The Fifth Circuit never held that racial comments were required to be directed toward a plaintiff in order to establish a hostile work environment under Title VII. It simply found that the evidence in this case was insufficient to support a racially hostile working environment claim.

of Law" which she authorized as part of the Joint Pretrial Order. Those "Agreed Applicable Propositions of Law" required Petitioner to establish all of the following elements (which are also recited in the Fifth Circuit's opinion) in order to establish a claim for racially hostile working environment:

(1) plaintiff belongs to a protected class;

(2) plaintiff was subjected to unwelcome racial harassment;

(3) the harassment complained of was based on plaintiff's race;

(4) the harassment affected a term, condition or privilege of employment; and

(5) the employer is liable for the harasser's conduct and knew or should have known of the harassment and failed to take prompt, effective, remedial action.

See also Shepherd v. Comptroller of Public Accounts of State of Tex., 168 F.3d 871, 873 (5th Cir. 1999). In addition, both the Agreed Applicable Propositions of Law and the Fifth Circuit opinion required Petitioner to show: (1) racially discriminatory intimidation, ridicule, and insults which are; (2) sufficiently severe or pervasive that they; (3) alter the conditions of employment; and (4) create an abusive working environment. *See also Harris*, 510 U.S. at 21, 114 S. Ct. at 370; *DeAngelis v. El Paso Mun. Police Officers Ass'n.*, 51 F.3d 591, 594 (5th Cir. 1995). The facts presented by Petitioner at trial do not satisfy these elements. The events about which she complains cannot be characterized as racial

harassment, nor do they involve any type of intimidation, ridicule, or insults — much less intimidation, ridicule, or insults which can be described as racially discriminatory. Accordingly, an additional ground for denying certiorari in this case is that the Fifth Circuit correctly decided it.

In an attempt to counteract her failure to satisfy the elements of a racially hostile working environment claim, Petitioner misrepresents the effect of the one Fifth Circuit case she references. *Huckabay v. Moore*, 142 F.3d 233 (5th Cir. 1998) does not stand for the proposition that difference in treatment of similarly situated employees is used determining whether a work environment is hostile on account of race, at least not when the difference in treatment is the type of non-harassing conduct alleged by Petitioner in this case. In *Huckabay* (which was a reverse discrimination case), white employees were subjected to harassing conduct which black employees were not subjected to. For instance, the plaintiff was "'assigned to standing in the rain on May 8, 1995' while blacks were allowed to take shelter." *Id.*, 142 F.3d at 240. These facts stand in stark contrast to the non-harassing conduct relied on by Petitioner in this case. On the other hand, the court in *Huckabay* specifically recognized that "demotion is a different sort of discrimination from the day-to-day harassment that makes [a] workplace a hostile environment." *Id.* at 239-240. Because the conduct identified by Petitioner in this case more closely resembles the demotion in *Huckabay* and not the harassing conduct, *Huckabay* actually works against Petitioner in this matter.

Finally, in the only other case Respondent has been able to locate in which the plaintiff attempted to prove racial harassment through a showing of disparate treatment, the Seventh Circuit stated its belief that incidents of alleged

disparate treatment cannot be characterized as rising to the level of a racially hostile working environment. *Johnson v. City of Fort Wayne, Indiana*, 91 F.3d 922, 938 (7th Cir. 1996). Simply put, the Fifth Circuit's decision is correctly decided and entirely consistent with the only other court of appeals to have directly considered a similar theory of the case. Accordingly, there is no reason for the Court to grant certiorari.

III. The question presented by this case is not the type of important federal question which would warrant the grant of certiorari because the question is unlikely to arise on a frequent basis.

The fact that Respondent has been able to locate only one other case directly addressing a similar theory as the one presented in this case also illustrates another basis for denying certiorari. Specifically, the theory of the case adopted at trial by the Petitioner is so unusual that it is unlikely to arise in other cases except in circumstances that would be considered anomalous.

Most of the time, if a plaintiff can present evidence of disparate treatment, she will assert a disparate treatment theory of discrimination. If she can also present evidence of a discriminatorily hostile working environment, she will assert harassment as an additional cause of action. Numerous cases illustrate that it is commonplace for the two theories to be asserted separately, but simultaneously. *See, e.g., Okruhlik v. University of Arkansas ex rel. May*, 255 F.3d 615 (8th Cir. 2001); *McPhaul v. Board of Commissioners of Madison County*, 226 F.3d 558 (7th Cir. 2000); *Allen v. Michigan Department of Corrections*, 165 F.3d 405 (6th Cir. 1999); *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371 (11th

Cir. 1996); *Wallace v. Texas Tech University*, 80 F.3d 1042 (5th Cir. 1996); *Bolden v. PRC, Inc.*, 43 F.3d 545 (10th Cir. 1994). The fact that the two theories are distinct and require different types of proof is succinctly illustrated by a passage from Justice Thomas' dissenting opinion in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998):

> Accordingly, after *Rogers*, a plaintiff claiming employment discrimination based upon race could assert a claim for a racially hostile work environment, **in addition to the classic claim of so-called "disparate treatment."** A disparate treatment claim required a plaintiff to prove an adverse employment consequence and discriminatory intent by his employer. A hostile environment claim required the plaintiff to show that his work environment was so pervaded by racial **harassment** as to alter the terms and conditions of his employment.

Id., 524 U.S. at 767-768, 118 S. Ct. at 2272 (Thomas, J., dissenting) (citations omitted, emphasis added).

There is no good reason for a plaintiff whose only evidence involves what is traditionally characterized as disparate treatment to eschew that theory in favor of a convoluted theory of racial harassment where the so-called harassment purportedly takes the form of disparate treatment. Accordingly, similar cases are unlikely to arise again in the future, so this case does not present the type of important federal question which would warrant the granting of certiorari.

CONCLUSION

Petitioner chose to assert only a racially hostile working environment theory at trial, despite the fact that none of her allegations or evidence involved conduct that could even remotely be described as "harassment." The Fifth Circuit correctly set forth the elements which a plaintiff is required to establish in order to prevail on a claim for racially hostile working environment — elements which are entirely consistent with previous opinions of this Court and with the "Agreed Applicable Propositions of Law" agreed to by Petitioner in the parties' Joint Pretrial Order — and correctly concluded that the evidence presented at trial was insufficient to support a claim for racially hostile working environment. The Fifth Circuit's decision in no way conflicts with previous decisions of this Court or other circuits. Furthermore, the theory of the case adopted by Petitioner in this matter is so unusual that it is unlikely to arise again in the future. For all of these reasons, Respondent respectfully requests that the Court deny the Petition for a writ of Certiorari.

Respectfully submitted,

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(3)

No. 01-1555

Supreme Court, U.S.
FILED

JUN 13 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

KATHY W. FENTROY,

Petitioner,

v.

DILLARD TEXAS OPERATING LIMITED PARTNERSHIP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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28 pg

QUESTIONS PRESENTED

1. Are racial comments directed towards a plaintiff required under Title VII to establish a claim of hostile work environment when there is sufficient evidence of racially disparate treatment in terms and conditions of employment, such as promotion, compensation, demotion and other general racial differences in treatment in the workplace?

2. Can sufficient evidence of racially disparate treatment in terms and conditions of employment, such as promotion, compensation, demotion, and general racial difference in treatment in the workplace, be used to support a claim of hostile or abusive work environment racial harassment?

3. Has the plaintiff established a claim of a racially hostile and discriminatory work environment when she presents sufficient evidence that she was persistently subjected to a work environment in which she was harassed and discriminated against because of her race, in that less qualified white employees were given promotions, larger raises, more desirable work assignments, similarly situated white employees were returned to their regular positions after their leave of absence terminated, while plaintiff was assigned to an inferior position and that she was criticized more harshly than similarly situated white employees?

4. When the Circuit Court reversed the trial judge's order denying the employer's motion for judgment as a matter of law and amended judgment, awarding

QUESTIONS PRESENTED – Continued

compensatory damages and rendered judgment as a matter of law for the employer, did the Circuit Court commit reversible error?

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42 U.S.C. § 2000e, *et seq.* 5

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REPLY TO COUNTERSTATEMENT OF CASE

In reply to points raised by Respondent, and to clarify the facts, Petitioner's pleadings and proof at trial set forth and established that Ms. Fentroy was subjected to a discriminatorily hostile and abusive work environment. Some of the evidence presented to the jury included testimonial and documentary evidence establishing that Ms. Fentroy was persistently passed over for promotions with the positions being given to less qualified white area sales managers ("ASM's").[1] Further, the jury heard evidence that Ms. Fentroy received less in pay raises over a period of time than her non-African American counterparts. In short, Ms. Fentroy was prevented, by discriminatory conduct, from advancing in her career and from remaining on the job. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).

Contrary to Respondent's assertions, the factual allegations of Fentroy's original complaint included specifically and generally, the hostile work environment claim. Fentroy complained generally throughout her complaint that her work environment was permeated with discrimination. Specifically set forth in paragraphs thirty-one, and fifty-one are the following:

> 31. Fentroy was physically weakened by the constant racial harassment. She began

---

[1] For instance, the jury received evidence that white ASM's Janet Wilson and Scott Smith and Dawn Allred, among others were promoted to operations manager after Ms. Fentroy had informed Respondent of her interest in career advancement. [Tr. 2:47-52] Whereas, Ms. Fentroy was moved laterally into another ASM position at the Woodlands store and told that it was a promotion.

> medical treatment because of the hostile work environment
>
> 51. Fentroy was forced out of her job by conduct that was so abusive that the work environment became intimidating, offensive, hostile and intolerable. [ROA 10 and 6].

Discovery was conducted in accordance with the contentions raised by the parties in their respective pleadings and not solely on the disparate treatment complained of in the pleadings.

Although Respondent recites what he describes as Petitioner's misstatements and misunderstandings of the case, the case set forth by Petitioner is supported by the record, included the attached appendix. From the trial record, Ms. Fentroy was the only African-American ASM while she worked at the Gulfgate store. She was the only African-American ASM at the Woodland's store for the first nine 'months of the discriminatory treatment and harassment and approximately one (1) month and a few days before she suffered a nervous breakdown which necessitated a medical leave of absence.

REASONS FOR GRANTING WRIT

The Court of Appeals erred in its decision that Respondent was entitled to judgment as a matter of law.

Respondent asserts that the Court of Appeals simply found insufficient evidence to support a racially hostile work environment claim. However, Ms. Fentroy contends that there was sufficient evidence, when viewed in its totality, for the jury to conclude that Respondent had discriminated against Ms. Fentroy on account of her race

by subjecting her to a hostile work environment. The Court of Appeals, however, misapplied the standard of review of Rule 50 by failing to draw all reasonable inferences in favor of Ms. Fentroy and it disregarded the evidence in support of Ms. Fentroy's *prima facie* case. Fed. Rule Civ. Proc. 50(a). Specifically, the Court of Appeals disregarded evidence that Ms. Fentroy was subjected to a racially discriminatory intimidation, ridicule or insult. The Court of Appeals disregarded evidence or racial harassment. The race-related comments, made by Respondent's managers Williams and Olejniczak were discounted by the Court of Appeals as not remarks about Fentroy's race; even though the remarks and discriminatory actions concerned African-Americans. Ms. Fentroy is African-American. Also, the disparate treatment was further evidence of race animus. The Court of Appeals erred in substituting its judgment regarding the weight of evidence, which is a function for the jury. See *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 120, 133 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

Respondent cited *Johnson v. City of Fort Wayne, Indiana*, 91 F.3d 922 (7th Cir. 1996) in support of its contention that "incidents of alleged disparate treatment cannot be characterized as rising to the level of a racially hostile work environment." However, the *Johnson* court recognized the principle that discrimination based on race can create a hostile work environment when instances of disparate treatment are not viewed in isolation but in the aggregate. In *Johnson,* the court reasoned:

> Viewing each of the enumerated instances of mistreatment in isolation, we may read this complaint to allege that he was singled out for less favorable treatment on account of his race. **We may also view these instances in the**

> **aggregate and read Mr. Johnson's complaint as asserting that the sum of the defendant's discriminatory conduct created a racially hostile work environment.** Title VII encompasses both types of claims; its proscriptions are violated either if Mr. Johnson is able to demonstrate that he was treated less favorably than other employees on the basis of his race, see *International Bhd. of Teamsters*, 431 U.S. at 335 n. 11, or if discrimination based upon Mr. Johnson's race created a hostile work environment, e.g., *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir. 1991). Accordingly, we evaluated Mr. Johnson's allegations under each of these theories of recovery.

The Seventh Circuit examined six separate instances of racial discrimination: (1) directive that Mr. Johnson be excluded from certain policy meetings of the Fire Department; (2) Mr. Johnson's arrest at a tavern that had nothing to do with his employer; (3) the Department's refusal to permit him to use a Department vehicle while he was on vacation and to provide him with vacation pay at the Assistant Chief grade; (4) Chief Hinton's order that Mr. Johnson stay away from fire stations and fire scenes while on sick leave; (5) Chief Hinton's repeated orders that Mr. Johnson be evaluated by the city doctor; and (6) his demotion to his prior rank of Lieutenant. After analyzing the instances of alleged discrimination in isolation, the Seventh Circuit granted summary judgment on most of these contentions. Then the court analyzed the same contentions (disparate treatment in the aggregate) under the hostile work environment-racial harassment theory and found on those particular facts that the conduct did not rise to the level of a hostile work environment.

In sharp contrast to the foregoing, Ms. Fentroy's evidence to the jury showed that she was persistently subjected to discrimination and harassment, which prevented her from advancing in her career and remaining on the job. The Fifth Circuit would not examine the contentions in the aggregate as had the district judge and the jury. Instead, the Fifth Circuit reviewed the disparate treatment evidence in isolation in rendering its decision that the disparate treatment may support a disparate treatment claim, but disparate treatment did not support the hostile work environment claim.

In weighing all of the evidence, and observing the demeanor of the witnesses the jury essentially answered, under the instructions of the parties (Appendix), that discrimination based on race, in terms and conditions of employment, such as promotion decisions, compensation decisions, job assignment upon return from leave of absence decisions, and numerous other acts of discriminatory treatment, i.e., disparate treatment, rose to the level of a hostile and abusive work environment.[2] The Court of Appeals erred.

CONCLUSION

In sum, this court should grant this Petition for Writ of Certiorari on this important federal question and to clarify the intent of Congress in enacting Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e,

[2] The Respondent set forth a portion of the agreed upon jury instructions. (Brief in Opposition, Page 8). The Petitioner included the complete special instructions and interrogatories in the Appendix.

et seq. As agreed to in *Meritor,* and as apparently rejected by the Court of Appeals, a violation of Title VII may be established by proving that discrimination based on race has created a hostile work environment.

> "[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . " *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) citing *Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir. 1971).

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KATHY W. FENTROY Plaintiff, v. DILLARD TEXAS OPERATING LIMITED PARTNERSHIP Defendant.	§ § § § § § § § §	C.A. No. 97-3213 (Filed Oct. 19, 1999)

SPECIAL INSTRUCTIONS AND INTERROGATORIES

GENERAL INSTRUCTIONS

Members of the Jury:

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you the jury are the judges of the facts. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case.

You will shortly hear the closing arguments of the attorneys. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

Answer each question from the facts as you find them. Do not decide who you think should win and then

answer the questions accordingly. Your answer to each question must be unanimous.

It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

You must answer all questions from a preponderance of the evidence. By this is meant the greater weight and degree of credible evidence before you. In other words, a preponderance of the evidence just means the amount of evidence that persuades you that a fact is more likely than not so. In determining whether any fact has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called the witness, and all exhibits received in evidence, regardless of who may have introduced the exhibit.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was

different from the testimony the witness gave before you during the trial. You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

A witness may be discredited or "impeached" by contradictory evidence, by showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witnesses' present testimony. If you believe that any witness has been impeached, then you have the right to give the testimony of that witness the credibility or weight, if any, that you think it deserves.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a corporation

may bind a corporation by his or her acts and declarations made while acting within the scope of his or her authority and delegated to him or her by the corporation, or within the scope of his or her duties as an employee of the corporation.

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case. The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field – he is called an expert witness – is permitted to state his opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from the evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he testifies regularly as an expert witness and his income form [sic] such testimony represents a significant portion of his income.

There are two types of evidence that you may consider in properly finding the truth as to the facts in this case. One is direct evidence – such as testimony of an eyewitness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

You will recall that during the course of this trial I instructed you that I admitted certain testimony for a limited purpose. You may consider such evidence only for the specific limited purpose for which it was admitted.

Any notes that you have taken during this trial are only aids to memory. If your memory should differ from your notes, then you should rely on your memory and not on the notes. The notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

In order for Plaintiff to establish an actionable claim of racial harassment under Title VII she must demonstrate the following:

1. That she belongs to a protected class;
2. That she was subject to unwelcome racial harassment;
3. That the harassment was based on race;

4. That the harassment affected a "term, condition, or privilege of employment;" and

5. That the employer either knew or should have known of the harassment and failed to take prompt remedial action.

To further establish that the harassment rose to the level of a hostile work environment, Plaintiff must additionally show:

1. racially discriminatory intimidation, ridicule, and insults, which are;

2. sufficiently severe or pervasive that they;

3. altered the conditions of her employment; and

4. created an abusive working environment.

In order for conduct to be sufficiently severe or pervasive to create an abusive working environment, it must create an environment that a reasonable person would find hostile or abusive and that the victim herself perceived to be hostile or abusive. In making this determination, you should look to factors such as the frequency of the conduct, its severity, the degree to which it is physically threatening or humiliating, and the degree to which it unreasonably interferes with an employee's work performance. No single factor is required.

Not all work place harassment affects a term, condition or privilege of employment within the meaning of Title VII. To establish that harassment was so severe and pervasive that it altered the conditions of employment and constituted an abusive working environment, Plaintiff must prove more than a few isolated incidents

of racial enmity. It is not enough for Plaintiff to simply show that she was treated badly and that she is black. The mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee does not effect [sic] the conditions of employment to a sufficiently significant degree to violate Title VII. Similarly, even racial comments that are sporadic or part of casual conversation do not violate Title VII.

In order to establish that her allegations of failure to promote, unequal compensation, and demotion created a hostile work environment, Plaintiff must show that those employment actions were motivated by her race. She can do this either by direct evidence or by an indirect or inferential method of proof. When a plaintiff attempts to prove that actions were motivated by her race through an indirect or inferential method of proof:

- Plaintiff has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination.
- If the plaintiff succeeds in proving a *prima facie* case, the defendant must articulate a legitimate, non-discriminatory reason for its actions.
- If the defendant can articulate a non-discriminatory reason for its actions, then the plaintiff must prove that the defendant's articulated reasons are not the true reasons, but are a pretext for discrimination.

In order to establish a *prima facie* case involving denial of promotion, Plaintiff must show:

1. That she is a member of a protected group;
2. That she applied for a position for which she was qualified;
3. That she was rejected; and
4. That after she was rejected, Dillard's promoted or continued to seek a person who was not a member of the protected group for the job.

Further, when a plaintiff relies on the relative qualifications between herself and other employees in an effort to prove unlawful discrimination, she must show that she was "clearly better qualified" than the other employees with whom she compares herself.

In order to establish a *prima facie* case of discrimination regarding compensation, Plaintiff must prove:

1. That she is a member of a protected class; and
2. That she was compensated less than a non-member of the protected class for work requiring substantially the same responsibility.

In order to establish a *prima facie* case of discriminatory demotion, Plaintiff must show that:

1. She was demoted;
2. She was qualified for the position she occupied;
3. She was within a protected class at the time of demotion; and
4. Either:

(i) the position she occupied was filled by someone outside the protected class; or

(ii) she was otherwise demoted because of a protected factor.

In order to establish that Defendant's articulated reasons for its actions are a pretext for discrimination, Plaintiff must show:

1. That Dillard's stated reasons were not what actually motivated it; and

2. That race was a determinative factor in the actions of which Plaintiff complains.

When making your decisions, you are not to decide whether you, as an employer, would have treated plaintiff differently under the same circumstances. You are not here to judge whether defendant's decisions were right or wrong from a business or educational standpoint.

Stray remarks in the workplace do not constitute evidence of discrimination. This means that statements made by persons not involved in the decisions pertaining to Plaintiff and statements made by decision makers that are unrelated to those decisions should not be considered by you in deciding whether Dillard's discriminated against Plaintiff on the basis of her race by maintaining a racially hostile working environment.

Assertions of subjective belief do not constitute facts. Therefore, the subjective belief of Plaintiff (or any other witness) that she has been discriminated against does not constitute evidence of discrimination.

Question No. 1:

> Do you find from a preponderance of the evidence that Dillard Texas Operating Limited Partnership subjected Ms. Fentroy to a hostile or abusive work environment on account of her race?

Answer "We do" or "We do not."

ANSWER: We do

If you answer to Question No. 1 is "We do," go to Question No. 2.

Question No. 2 addresses the award of damages. If the plaintiff has proven her claim against the defendant by a preponderance of the evidence, you must determine the damages to which the plaintiff is entitled. You should not interpret the fact that I have given instructions about the plaintiff's damages as an indication in any way that I believe that the plaintiff should, or should not, win this case. It is your task first to decide whether the defendant is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the defendant is liable and that the plaintiff is entitled to recover money from the defendant. If you find that the defendant is liable to the plaintiff, then you must determine an amount that is fair compensation for all of the plaintiff's damages. You may award compensatory damages only for the injuries that the plaintiff proves were proximately caused by the defendant's allegedly wrongful conduct.

The damages that you award must be fair compensation for all of the plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendant. You should not award compensatory damages for

speculative injuries, but only for those injuries which the plaintiff has showed she actually suffered or that the plaintiff is reasonably likely to suffer in the future. If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let the difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiff prove the amount of her losses with mathematical precision, but only with as must definiteness and accuracy as the circumstances permit. You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

1. Loss of income from denied raises and/or promotion up to the time of resignation

2. Past and future mental anguish

The term "mental anguish" means relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment, or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, and/or public humiliation. You must determine the amount of mental anguish damages sustained by the plaintiff, both in the past and in the future. A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate – to avoid or minimize those

damages. If you find the defendant is liable and the plaintiff has suffered damages, the plaintiff may not recover for any item of damage which she could have avoided through reasonable effort. If you find from a preponderance of the evidence the plaintiff unreasonably failed to take advantage of an opportunity to lessen her damages, you should deny her recovery for those damages which she would have avoided had she taken advantage of the opportunity.

You are the sole judge of whether the plaintiff acted reasonably in avoiding or minimizing her damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce her damages. However, she is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating the damages. The defendant has the burden of proving the damages which the plaintiff could have mitigated. In deciding whether to reduce the plaintiff's damages because of her failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant has satisfied its burden of proving the plaintiff's conduct was not reasonable.

If you find that the plaintiff is reasonably certain to suffer damages in the future from her injuries, then you should award her the amount you believe would fairly compensate her for such future damages. An award of the future damages necessarily requires that payment be made now for a loss that plaintiff will not actually suffer until some future date.

You must not make any adjustment to present value for any damages you may award for future mental anguish.

Question No. 2:

> What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiff for the compensatory damages, if any, caused by the discriminatory actions of Dillard's?

Answer in dollars and cents, if any, or "zero."

ANSWER: $24,000.

If you have found that Ms. Fentroy is entitled to any damages, go to Instruction No. 3. If you answer is "0", stop here.

You also may award punitive damages, if the plaintiff has proved that the defendant acted with malice or reckless indifference to her federally protected rights. If you determine that the defendant's conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion and award those damages. In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a defendant for shocking conduct, and to deter the defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages; however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. However, the amount can be as large as you

believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of the defendant in fixing the amount of punitive damages.

Question No. 3:

> Do you find from a preponderance of the evidence that the defendant, Dillard Texas Limited Operating Partnership, engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of Ms. Fentroy?

Answer "We do" or "We do not."

ANSWER: We do

If you answer to Question No. 3 is "We do," go to Question No. 4.

Question No. 4:

> What amount of money, if any, do you find from a preponderance of the evidence should be assessed as punitive damages against the defendant Dillard Texas Operation Limited Partnership?

Answer in dollars and cents, if any.

ANSWER: $72,000

It is your sworn duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you are wrong.

However, do not give up your honest beliefs solely because the others think differently, or merely to finish the case. Remember that in a very real way you are the judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you retire to the jury room to deliberate, you may take with you this charge and the exhibits that the court has admitted into evidence. Select your Foreperson and conduct your deliberations. If you recess during your deliberations, follow all of the instructions that I have given you concerning your conduct during the trial. After you have reached your unanimous verdict, your Foreperson must fill in your answers to the written questions and sign and date the verdict form. Unless I direct you otherwise, do not reveal your answers until such time as you are discharged. You must never disclose to anyone, not even to me, your numerical division on any question.

If you want to communicate with me at any time, please give a written message to the Marshal, who will bring it to me. I will then respond as promptly as possible either in writing or by meeting with you in the courtroom. I will always first show the attorneys your question and my response before I answer your question.

After you have reached a verdict, you are not required to talk with anyone about the cause unless I order you to do so.

You may now retire to the jury room to conduct your deliberations.

SIGNED on 18 day of October, 1999.

/s/ David Hittner
DAVID HITTNER
United States District Judge

VERDICT

We, the jury, have unanimously answered the foregoing Jury Questions as indicated above and return the same into the Court as our verdict in this case.

/s/ _____ 10/19/99
FOREPERSON DATE